DUGAN PRODUCTION CORP. (ON RECONSIDERATION)

IBLA 86-1516 Decided December 13, 1990

Petition for reconsideration of Dugan Production Corp., 103 IBLA 362 (1988), reversing a decision of the Director, MMS, affirming assessment of late payment charges. MMS 85-186-O&G.

Petition for reconsideration granted; Dugan Production Corp., vacated; decision of Director, MMS, affirming assessment of late payment charges affirmed.

1. Federal Oil and Gas Royalty Management Act of 1982: Assessments--Federal Oil and Gas Royalty Management Act of 1982: Royalties--Oil and Gas Leases: Royalties

MMS is required by law to assess interest charges on late royalty payments for oil and gas leases which are not received by the due date. Where MMS seeks reconsideration of a Board decision reversing an order assessing late payment charges because of lack of evidence that the payments were untimely, and presents evidence conclusively showing that the lessee's payments were in fact untimely, the Board will vacate its earlier decision and affirm the MMS order assessing late payment charges.

APPEARANCES: Peter J. Schaumberg, Esq., Howard W. Chalker, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE KELLY

On October 11, 1988, the Minerals Management Service (MMS) filed a petition for reconsideration of the Board's August 11, 1988, decision in Dugan Production Corp., 103 IBLA 362, in which we reversed an April 7, 1986, decision of the Director, MMS, affirming the assessment of late payment charges against the Dugan Production Corporation (Dugan).

MMS assessed late payment charges based on its conclusion that Dugan had failed to pay royalty timely with respect to production from onshore Federal oil and gas leases during October 1984. Under 30 CFR 218.50(a) (1985), such payment was due on the last day of the month following the month of production, here, November 30, 1984. MMS asserted that payment had not been received until December 5, 1984, 5 days late, but failed to

submit any documentation establishing the date of receipt of the royalty payment. MMS chose to rely on the presumption that administrative officials have properly discharged their duties and not lost or misplaced legally significant documents filed with them. Dugan, on the other hand, submitted evidence that the payment had been shipped on November 30, 1984, with instructions to hand deliver it to MMS by 4 p.m. on that day. 1/

Ruling that the presumption of regularity did not apply in the absence of submission of the original payment vouchers that Dugan had filed with MMS, duly datestamped to show that they were untimely filed, we held that Dugan had established by a preponderance of the evidence that the payment had been timely received. Accordingly, we reversed the Director's April 7, 1986, decision.

Along with its petition for reconsideration, MMS has submitted a copy of the portion of the check submitted in payment of the royalties due for October 1984, which had been retained by MMS. That copy reveals that the check was dated November 30, 1984, the date Dugan mailed it to MMS. However, the copy bears a December 5, 1984, date stamp, indicating its receipt by MMS on that date. In addition, MMS has submitted a copy of a "Payment Processing Worksheet," as to which MMS states: "Dugan's Check No. 14430
was matched for record keeping purposes with the form MMS-2014 submitted
by Dugan with its check. (Form MMS-2014 is used to report royalty payment[s] to MMS)." This document is also datestamped December 5, 1984.

These submissions substantiate MMS' claim that Dugan's royalty payment check was not received by MMS until December 5, 1984. See Whelan's Mining & Exploration, Inc., 58 IBLA 127, 129 (1981). However, MMS has not furnished any explanation why these documents were not provided along with the original case file or at the time MMS filed its answer in response to Dugan's statement of reasons for appeal.

Dugan has filed no reply to MMS' petition for reconsideration and thus has not challenged MMS' evidence supporting its receipt of the royalty payment on December 5, 1984. 2/

[1] Under 43 CFR 4.403, the Board "may reconsider a decision in extraordinary circumstances for sufficient reason." Generally, the Board is reluctant to grant a petition for reconsideration on the basis of new information submitted with the petition and unaccompanied by an explanation as to why it was not provided prior to the decision which the party seeks to have reconsidered. Here, however, an extraordinary circumstance obtains because the evidence submitted with the petition for reconsideration demonstrates that late payment charges were properly assessed and indeed, were required to be assessed under statute and regulation. Section 111(a) of

1/ Receipt by 4 p.m. was necessary to avoid the assessment of late payment charges. See 30 CFR 218.102(b).
2/ MMS' petition for reconsideration contains a certification indicating it was duly served on counsel for Dugan.

the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1721(a) (1982), specifically provides that "where royalty payments are not received by the Secretary on the date that such payments are due, or are less than the amount due, the Secretary shall charge interest on such late payments or underpayments * * *." The regulation implementing this statutory provision also requires the assessment of interest on late payments or underpayments. 30 CFR 218.54; Exxon Company, U.S.A., 115 IBLA 81, 85 (1990). In the decision being reconsidered, we were unable to affirm assessment of late payment charges because the record did not contain documents conclusively showing that the lessee failed to pay royalty timely. In light of MMS' submissions, the record now shows conclusively that Dugan's royalty payments were filed late. MMS' failure to provide an explanation as to why its evidence was not filed sooner cannot be condoned. Such failure, does not, however, empower the Board to ignore the requirements of statute and regulation, and thereby provide the lessee a benefit not authorized by law.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in Dugan Production Corp., 103 IBLA 362 (1988), is vacated, and the determination of MMS assessing late payment charges is affirmed.

John H. Kelly
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE HUGHES DISSENTING:

I respectfully dissent from the majority's decision granting Minerals Management Service's (MMS') petition for reconsideration and affirming the assessment by MMS of late payment charges against Dugan Production Company (Dugan). I would deny the petition for reconsideration as not demonstrating extraordinary circumstances justifying reopening the record.

MMS assessed late payment charges based on its conclusion that Dugan had failed to pay royalty timely with respect to production from onshore Federal oil and gas leases during October 1984. Under 30 CFR 218.50(a) (1985), such payment was due on the last day of the month following the month of production, here, November 30, 1984. MMS asserted that payment had not been received until December 5, 1984, 5 days late, but failed to submit any documentation whatsoever establishing the date of receipt of the royalty payment, opting instead to rely on the "presumption of regularity." On the other hand, Dugan had submitted evidence that the payment had been shipped on November 30, 1984, with instructions to hand deliver it to MMS by 4 p.m. on that day. 1/

Ruling that the presumption of regularity did not apply in the absence of submission of the original payment vouchers that Dugan had filed with MMS, duly date-stamped to show that they were untimely filed, we held that Dugan had established by a preponderance of the evidence that the payment had been received timely. Accordingly, we reversed the Director's April 1986 decision.

Along with its petition for reconsideration, MMS submitted a copy of the portion of the check submitted in payment of the royalties due for October 1984, which had been retained by MMS. 2/ That copy reveals that the check was dated November 30, 1984, the date Dugan mailed it to MMS. However, the copy appears to bear a December 5, 1984, date-stamp, indicating its receipt by MMS on that date. In addition, MMS has submitted a copy of a "Payment Processing Worksheet," as to which MMS states: "Dugan's Check No. 14430 was matched for record keeping purposes with the Form MMS-2014 submitted by Dugan with its check. (Form MMS-2014 is used to report royalty payment[s] to MMS.)" This document also appears to be date-stamped December 5, 1984.

These submissions substantiate MMS' claim that Dugan's royalty payment check was not received by MMS until December 5, 1984. See Whelan's Mining & Exploration, Inc., 58 IBLA 127, 129 (1981). Dugan has not replied to MMS' petition for reconsideration. Thus, Dugan has not challenged MMS' evidence supporting its receipt of the disputed royalty payment on December 5, 1984.

1/ Receipt by 4 p.m. was necessary in order to avoid the assessment of late payment charges. See 30 CFR 218.102(b) (1985).
2/ No explanation has been provided for why a copy of the check was submitted, instead of the original.

However, there is nothing in MMS' accompanying petition which explains the reason why these documents were not provided along with the original case file or at the time MMS filed its answer in response to Dugan's statement of reasons for appeal. As a general rule, the Board will not grant a petition for reconsideration on the basis of new information which is submitted for the first time along with the petition where no adequate explanation is provided for the failure to submit the information prior to issuance of the decision which the party seeks to have reconsidered. We have recently ruled as follows, concerning a petition filed by the Bureau
of Land Management (BLM), seeking reconsideration of a Board decision and submitting new evidence:

> In the present case, BLM's petition for reconsideration contains new information regarding the South Mountain Park lease not previously contained in its answer to appellant's [statement of reasons], which explains the basis for BLM's previous decision
> to disregard that lease because the rent charged was reflective
> of "political considerations." However, there is no explanation offered why this information was not provided to the Board during the course of the Board's original adjudication of appellant's appeal. * * *
>
> Where BLM had every opportunity to present this information and should have done so, especially where the primary thrust of appellant's SOR challenged BLM's decision to disregard the South Mountain Park lease, and where BLM has offered no explanation for failing to submit this information, we are not persuaded that BLM has demonstrated such "extraordinary circumstances" which would justify reconsideration of the Board's February 1989 decision.
>
> In these circumstances, BLM has failed to establish compliance with the regulatory prerequisites set forth in 43 CFR 4.403 for granting reconsideration. Accordingly, we conclude BLM's petition for reconsideration should be denied.

Richard Boulais, IBLA 87-370 (order denying petition for reconsideration, May 25, 1989); see Joash Tukle, IBLA 84-893 (order denying petition for reconsideration, June 11, 1985). 3/

3/ In Tukle, supra, we held,

"[a]n appellant's desire for the Board to consider additional information previously available to an appellant does not generally constitute an 'extraordinary circumstance' or 'sufficient reason' for reconsideration. * * * If reconsideration is sought on the basis of additional information, the [petitioner] should provide a sufficient explanation for his failure to present such information as part of the appeal."
Thus, the Board rejected the petition in part because of petitioner's failure to make sufficient explanation for his failure to provide the information while the appeal was before the Board. The Board also relied in part on the petitioner's failure to demonstrate the relevance of the proffered evidence.

The Board's order in Boulais is soundly based on the principle announced in the preamble to the current version of 43 CFR 4.403. The Board's decision whether to grant a petition for reconsideration is controlled by 43 CFR 4.403, which provides that "[t]he Board may reconsider a decision in extraordinary circumstances for sufficient reason." As the Department stated in promulgating the current version of 43 CFR 4.403:

> [The extraordinary circumstances] provision reinforces the Board's expectation that parties will make complete submissions in a timely manner during the appeal, not afterward on reconsideration. * * * In general, the Board does not give favorable consideration to a petition for reconsideration * * * which contains new material with no explanation for the petitioner's failure to submit such material while the appeal was pending. [Emphasis added.]

52 FR 21307 (June 5, 1987). By requiring that the petitioner provide an "explanation" for its failure to submit the information while the appeal was pending, the preamble alludes to the standard long applied in the case of evidence submitted for the first time on appeal from a decision by an administrative law judge after an evidentiary hearing. That is, the party seeking to submit such evidence must adequately explain why it was not submitted at the time of the hearing. Where no explanation is offered, the petition is properly denied. Richard Boulais, supra; Joash Tukle, supra; see United States v. Melluzzo, IBLA 86-1387 (order denying petition for reconsideration, Jan. 26, 1989); United States v. Hanson, 26 IBLA 300, 302-03 (1976).

In the present case, no less than in Boulais, there appears no justification for MMS' failure to realize the importance of timely submitting the critical evidence to the Board. Appellant directly put into issue the accuracy of the critical fact that MMS now belatedly establishes.

MMS contends that reconsideration is consistent with prior Board decisions in which we have permitted subordinate agencies of the Department to supplement the record where we have concluded that the record received on appeal is deficient, citing Mobil Oil Exploration & Producing Southeast, Inc. (MOEPSI), 90 IBLA 173 (1986), and Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982). It is apparently MMS' contention that the Board should grant reconsideration based on the receipt of new information after a final decision has issued in the same way that the Board permits the record to be supplemented prior to issuing a final decision on the merits. I disagree.

In cases such as MOEPSI and Soderberg, we have, in rendering an initial decision, either permitted the agency involved to supplement the record or set aside the agency decision and remanded the case for compilation of a more complete record precisely because there was no evidence on which to base such a decision by the Board. See, e.g., David V. Udy, 81 IBLA 58 (1984). That was not the case here. At the time of the Board's August 1988 decision, the record contained sufficient evidence to conclude that Dugan had submitted its royalty payment on time. On the basis of this evidence, and in the absence of any evidence to the contrary, we found that payment

was received by MMS at the time specified. See Washington Chromium Co., 60 IBLA 378 (1981). This is why we held in Dugan Production Corp., supra at 364, that Dugan had preponderated on the question of whether it had made a late payment with respect to the October 1984 production.

Further, it is well established that the administrative record at the time of issuance of an adverse decision by a subordinate agency of the Department must contain the factual basis supporting that decision. Exxon Company, U.S.A., 113 IBLA 199, 205 (1990). Where it does not, we have reversed the decision, as we did here. See Patricia B. Amoroso, 55 IBLA 190 (1981); Steven Lutz, 39 IBLA 386 (1979).

Admittedly, we have rarely reversed an agency's decision where the record does not support it and usually simply remand the matter to the agency for development of additional information. Indeed, in some circumstances, we could not properly reverse the decision. For example, where a decision by BLM rejecting an application for an interest in the public lands is unsupported by the record, but the record does not contain adequate information to grant the application, we could not grant the application by default, because doing so would give the applicant an interest that has not been shown to be authorized by law. I have no quarrel with this principle.

There is a fundamental difference in this case, however, in that MMS appears here in a quasi-prosecutorial role to collect late-payment charges for alleged misfeasance. In this context, it should rightly bear the burden of establishing that a violation has occurred. I believe (unlike the majority) that a person does have the right to submit a payment without paying a late-payment assessment where the Government does not conclusively and timely show that his payment was late. 4/ If the record is incomplete, the person should rightly prevail. The extreme step of reversal was rightly deemed suitable in our first opinion.

As pointed out in our first opinion, with the exception of matters of which the Board may take judicial notice, the Board is empowered to decide appeals only on the basis of the record submitted by the parties. It has no authority to speculate on the existence of evidence which is not a matter of record. That record is a result of the efforts of the parties appearing before the Board and is generally limited to material originally submitted to the Board. Where a party, whether a private appellant or a subordinate agency of the Department, fails to support its position at that time, it has no grounds to complain about an adverse Board decision unless it is able to provide a satisfactory explanation for its failure to submit evidence of the correctness of its position prior to the Board's decision and, thus, to satisfy the "extraordinary circumstances" requirement of 43 CFR 4.403. Where it is unable to do so, the Board should decline to reconsider its initial decision. As the Supreme Court stated in United States v. Northern Pacific Railway Co., 288 U.S. 490, 494 (1933):

4/ It is ironic that Dugan is being penalized for being late with its payment, while there is no penalty for MMS' lateness of proof.

> Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commissioner's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order. [Emphasis supplied.]

See also Bankers Pocahontas Coal Co. v. Burnet, 287 U.S. 308, 313 (1932). That is the situation here.

The majority's decision to grant reconsideration after a final decision has been rendered based on new information submitted with a petition for reconsideration, where no explanation for the late submission has been provided, will have unacceptable adverse consequences. One of the principal considerations in requiring submission of documentation to a decisionmaker before a decision is rendered is to ensure that the documentation has not been manufactured after the fact. Put another way, the presumption is that, if supporting evidence exists in the first place, it will be brought forward before a decision is made. In this way, a party is prevented from waiting for the decisionmaker's call on a case and then manufacturing the documents that will prove its case. This, I believe, is in large part the motivation for the Board's longstanding rule that a party may not supplement the record with evidence after the closing of the record unless he can demonstrate the evidence existed at the time of the original submission of the case to the Board but that, for some justifiable reason, it was not provided to the Board prior to its final decision.

I stress that there is no indication that MMS manufactured any evidence here. Nevertheless, allowing (as the majority does) the belated submission of documents without any justification for the failure to submit them timely sacrifices this important safeguard, for we will be hard pressed following the publication of this opinion to deny the public the same latitude that is being afforded to MMS here.

More pertinently to MMS, allowing reconsideration based on information belatedly submitted without explanation provides no disincentive for the agency not to submit a complete record to the Board when the appeal is filed. Phrased more directly, allowing the agency to submit information on reconsideration that should have been included in the original case file encourages slipshod preparation of case files in hopes that the Board will simply grant reconsideration upon the correction of the deficiency. It is my impression that incompleteness of MMS case files (and, increasingly of BLM case files) is an all too common problem faced by all of the Administrative Judges in reviewing agency decisions. Intelligent review of agency decisions is simply not possible where the agency refuses to provide the records underlying these decisions. Declining to reconsider a decision based on new information where there is no adequate explanation for the

late submission would have the salutary effect of ensuring that complete case records will be presented to the Board prior to any final decision. Overall, this would undoubtedly lead to better decisions by MMS and the Board.

The majority's action sends the clear message to MMS (and to BLM and the Office of Surface Mining Reclamation and Enforcement) that it has no obligation to comply with the Board's demands that we be given the complete, original administrative record when the notice of appeal is filed. Instead, the Board today tells the agency that it only needs to worry about preparing the case file if it loses the first round. I think this is a mistake.

David L. Hughes
Administrative Judge

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